Reply Comments
8 x 8, Inc.
American Cable Association, Inc.
Arkansas, Illinois, Iowa, and Oklahoma Rural Telephone Companies
Center for Democracy & Technology
Cisco Systems, Inc
Department of Justice, Federal Bureau of Investigation
Earthlink, Inc.
Electronic Frontier Foundation
Industry and Public Interest
International Association of Chiefs of Police, Major Cities Chiefs Association, National Sheriffs' Association, Major County Sheriffs' Association
Level 3 Communications, LLC
National Association of State Utility Consumer Advocates
National Cable & Telecommunications Association
Net2Phone, Inc.; Net2Phone Global Services, LLC; and Net2Phone Cable Telephony, LLC
New York State Attorney General's Office
Nextel Communications, Inc.
Rural Cellular Association
Skype Technologies, S.A.
Southern Communications, Services, et al.
Telecommunications Industry Association
T-Mobile USA, Inc.
Time Warner Telecom, Inc.
United States Cellular Corporation
United States Telecom Association
VeriSign, Inc
Verizon Wireless
Vonage Holdings Corp.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[349] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rule Making* ("*Notice*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above in paragraph 155. The Commission will send a copy of the *Notice of Proposed Rule Making and Declaratory Ruling*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[350] In addition, the *Notice of Proposed Rule Making and Declaratory Ruling* (or summaries thereof), including the IRFA, will be published in the Federal Register.[351]

A. Need for, and Objectives of, the Proposed Rules

The *Notice* proposes to permit law enforcement agencies ("LEAs") to better perform electronic surveillance of telecommunications carriers under several existing statutes by tentatively concluding that new broadband Internet services and "managed" Voice over Internet Protocol ("VoIP") services – *i.e.*, services that offer voice communications calling capability whereby the VoIP provider acts as a mediator to manage the communication between its end points and to provide, *e.g.*, call set up, connection, termination, and party identification features – are subject to the assistance capability requirements of the 1994 Communications Assistance for Law Enforcement Act ("CALEA"). The *Notice* also proposes steps to ensure that telecommunications carriers comply with CALEA. However, the *Notice* tentatively concludes that non-managed VoIP services are not subject to CALEA, and does not proposed to establish a pre-approval process for new technologies and services that would determine whether they are subject to CALEA, as requested by the Law Enforcement Petition. The Commission believes that these proposals strike an appropriate balance between better permitting LEAs to combat crime and terrorism and the limited scope of CALEA.

B. Legal Basis

This proposed action is authorized pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and sections 103, 106, 107, and 109 of the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 151, 154(i), 157(a), 229, 301, 303, 332, 410, 1002, 1005, 1006, and 1008.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply.

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[349] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 - 612, has been amended by the Contract With America Advancement Act of 1996, Public Law 104-112, 110 Stat. 847 (1996)(CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1966 (SBREFA).

[350] 5 U.S.C. § 603(a).

[351] *Id.*

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[352] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[353] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[354] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[355]

a. Telecommunications Service Entities

(i) Wireline Carriers and Service Providers

1. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[356] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[357] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

2. *Incumbent Local Exchange Carriers*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[358] According to Commission

[352] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[353] *Id.* § 601(6).

[354] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

[355] 15 U.S.C. § 632.

[356] *Id.* § 632.

[357] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[358] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

data,[359] 1,337 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

3. *Competitive Local Exchange Carriers, Competitive Access Providers, "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[360] According to Commission data,[361] 609 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 carriers, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1.500 or fewer employees. In addition, 35 carriers have reported that they are "Other Local Service Providers." Of the 35, an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action.

4. *Payphone Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[362] According to Commission data,[363] 761 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 757 have 1,500 or fewer employees and four have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action.

5. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[364] According to Commission data,[365] 261 carriers

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[359] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003) (hereinafter "Trends in Telephone Service"). This source uses data that are current as of December 31, 2001.

[360] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[361] "Trends in Telephone Service" at Table 5.3.

[362] 13 CFR § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[363] "Trends in Telephone Service" at Table 5.3.

[364] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[365] "Trends in Telephone Service" at Table 5.3.

have reported that they are engaged in the provision of interexchange service. Of these, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action.

6. *Operator Service Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[366] According to Commission data,[367] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action.

7. *Prepaid Calling Card Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[368] According to Commission data,[369] 37 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by our action.

(ii) Wireless Telecommunications Service Providers

8. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[370] and "Cellular and Other Wireless Telecommunications."[371] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[372] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[373] Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total,

[366] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[367] "Trends in Telephone Service" at Table 5.3.

[368] 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

[369] "Trends in Telephone Service" at Table 5.3.

[370] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

[371] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[372] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[373] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

that operated for the entire year.[374] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[375] Thus, under this second category and size standard, the majority of firms can, again, be considered small.

9. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications."[376] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[377] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[378] Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service ("PCS"), or Specialized Mobile Radio Telephony services, which are placed together in the data.[379] We have estimated that 294 of these are small, under the SBA small business size standard.[380]

10. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications."[381] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[382] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[383] Thus, under this category and associated small business size standard, the great majority of

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[374]U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[375]*Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[376]13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[377]U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[378]*Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[379]FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

[380]FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

[381]13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[382]U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[383]*Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

firms can be considered small. In the Paging *Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[384] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[385] The SBA has approved these small business size standards.[386] An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.[387] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. According to the most recent *Trends in Telephone Service,* 433 carriers reported that they were engaged in the provision of paging and messaging services.[388] Of those, we estimate that 423 are small, under the SBA approved small business size standard.[389]

11. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services auction. A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards.[390] The Commission auctioned geographic area licenses in the wireless communications services. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity.

12. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted earlier, the SBA has developed a

[384] Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, 62 FR 16004 (April 3, 1997), paras. 291-295.

[385] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, SBA (Dec. 2, 1998).

[386] "Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems," Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, at paragraphs 98-107 (1999).

[387] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085 para. 98 (1999).

[388] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

[389] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

[390] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, Small Business Administration (December 2, 1998).

small business size standard for "Cellular and Other Wireless Telecommunications" services.[391] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[392] According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of wireless telephony.[393] We have estimated that 294 of these are small under the SBA small business size standard.

13. *Broadband Personal Communications Service.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[394] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years."[395] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[396] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[397] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

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[391] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[392] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[393] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

[394] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R. § 24.720(b).

[395] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996).

[396] *See. e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332, 59 FR 37566 (July 22, 1994).

[397] FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (released January 14, 1997). *See also* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (October 24,1997).

b. Cable Operators

14. *Cable and Other Program Distribution.* This category includes cable systems operators and other program distribution services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually.[398] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[399] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

15. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[400] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[401] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

16. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[402] The Commission has determined that there are 67,700,000 subscribers in the United States.[403] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[404] Based on available data, the Commission

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[398] 13 CFR § 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

[399] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[400] 47 CFR § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

[401] Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

[402] 47 U.S.C. § 543(m)(2).

[403] See FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (Jan. 24, 2001).

[404] 47 CFR § 76.901(f).

estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[405] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[406] and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

c. Internet Service Providers

17. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers ("ISPs"). ISPs "provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity."[407] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less.[408] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[409] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24, 999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

D. Description of projected reporting, recordkeeping, and other compliance requirements.

The proposed rules require that telecommunications carriers providing Internet broadband access and managed VoIP services be CALEA-compliant.[410] The proposed rules also limit extensions of compliance deadlines under CALEA section 107(c), which authorizes extensions if technology is not available to carriers to meet the assistance capability requirements of CALEA section 103.[411] We also note that telecommunications carriers, including small entities, may petition the Commission under CALEA section 109(b) and argue that CALEA compliance is not reasonably achievable for a variety of reasons, including a carrier's financial resources.

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[405]See FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA-01-0158 (rel. January 24, 2001).

[406]The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR § 76.909(b).

[407]U.S. Census Bureau, "2002 NAICS Definitions: 518111 Internet Service Providers" (Feb. 2004) <www.census.gov>.

[408]13 C.F.R. § 121.201, NAICS code 518111 (changed from previous code 514191, "On-Line Information Services," in Oct. 2002).

[409]U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 514191 (issued Oct. 2000).

[410]*See Notice* at ¶¶ 1, 47, and 56.

[411]*Id.* at ¶¶ 2, 87, and 97.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[412]

We also note that telecommunications carriers, including small entities, may petition the Commission under CALEA section 109(b) and argue that CALEA compliance is not reasonably achievable for a variety of reasons, including a carrier's financial resources. We believe that this provision safeguards small entities from any significant adverse economic impacts of CALEA compliance. We are unaware of any alternatives that would better safeguard small entities, but we solicit comment on any such alternatives.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules.

None.

[412] 5 U.S.C. § 603(c).

APPENDIX C

TRUSTED THIRD PARTY MODELS

The most basic compliance solution, which has been used for surveillance of circuit-mode voice, is to build the necessary features into network equipment, as shown in Figure 1.

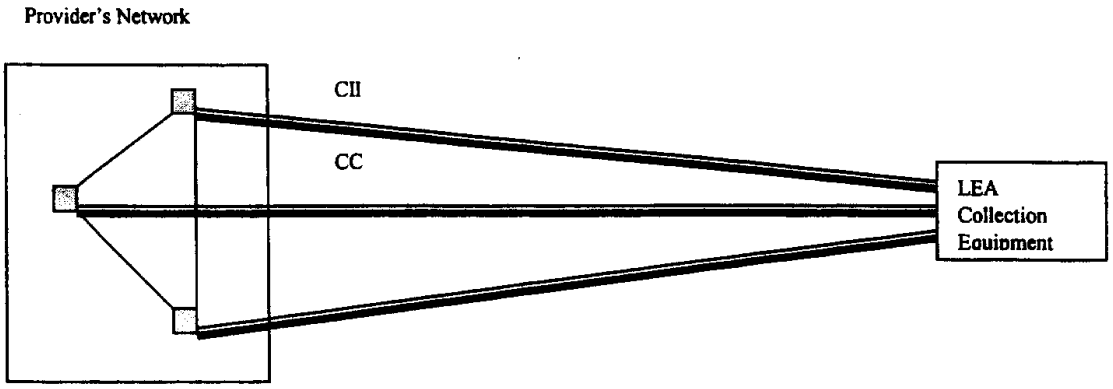

Figure 1: Compliance solution architecture based on direct feed from Intercept Access Point

In the figure, each gray box represents a piece of network equipment with an intercept access point, CII is the call-identifying information, and CC is call content; the CII and CC are provided to Law Enforcement in two separate channels. As shown in Figure 1, a piece of network equipment with an intercept access point hands off the necessary information to Law Enforcement. Network equipment that meets safe harbor standards for CII and CC interfaces would be CALEA compliant. We note that this could result in having many interfaces built between the network and Law Enforcement, with each interface using a slightly different option available under a standard.

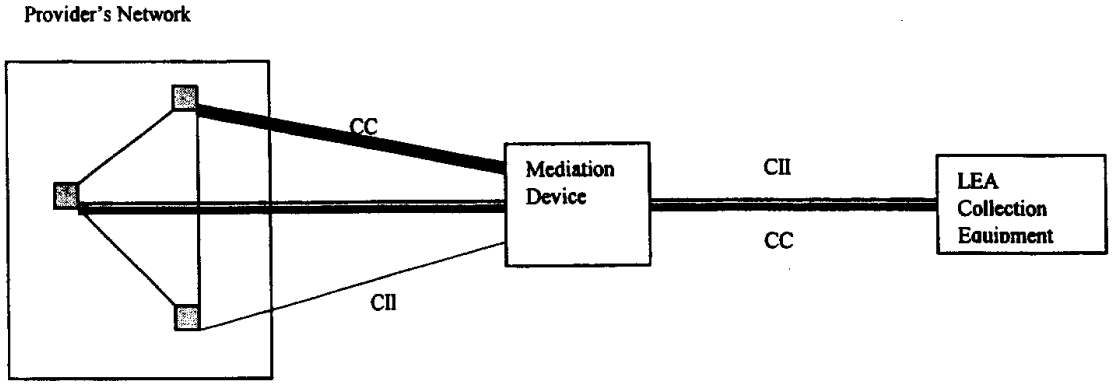

Figure 2: Compliance solution architecture based on Mediation Device

The first trusted third party approach involves use of a Mediation Device. This is illustrated in Figure 2. In this model, CII and CC channels from multiple pieces of network equipment are

aggregated by the Mediation Device. (Some systems may be capable of providing only CC or only CII, but not both, as shown in the figure.) The Mediation Device may also provide uniform formatting for Law Enforcement, thus eliminating any need by Law Enforcement or the service provider to mandate which of the many options allowed by the J-Standard and other standards must be used. In effect, the various pieces of network equipment may each use different options, and the Mediation Device can still provide a uniform interface to Law Enforcement. The manufacturers of network equipment would still need to satisfy safe harbor standards for both CII and CC in order to qualify as being CALEA compliant under safe harbor standards. The Mediation Device model is currently being used by a number of companies in the United States, including Time Warner and Comcast.

There is a second trusted third party approach that could be used to make the content and call-identifying information of a packet communication available. This approach is illustrated in Figure 3.

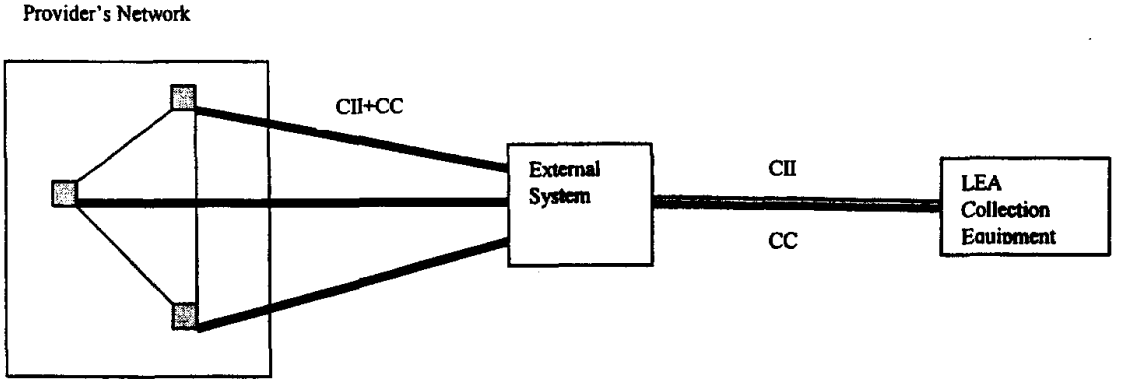

Figure 3: Compliance solution architecture based on External System

Technology is available today to have an External System identify, isolate and extract call-identifying information from the packets going to and from a subject. We seek comment on the feasibility of having the network equipment deliver all packets of a subject to an External System. In cases where the subject has a dynamically assigned IP address, is it still feasible for network equipment to deliver all of the subject's packets to an External System? Are there cases where surveillance of a subject with a dynamic IP address could be better accomplished with a Mediation Device, instead of an External System; or with a direct link between network equipment and LEA collection equipment? Could the packets be provided by one or more probes or "sniffers" on a line into a router or switch, instead of the router or switch itself? Could a subject's packets be provided to the External System by devices operating at layers below the Internet Protocol layer? For example, could a subject's packets be provided by an ATM switch based on virtual circuit identifiers, or by a cable modem termination system based on a MAC address? All packets to and from a subject may be delivered from network equipment to the External System in accordance with the J-Standard content requirements.[413] The CII and CC channels between the External System and LEA Collection

[413] We note that delivery of the subject's packet content by the service provider has been required under the *Order on Remand*. *See* n.32, *supra*.

Equipment may comply with available CII and CC interfaces defined in safe harbor standards. Regardless of how access to content is obtained, the External System could either be under the carrier's control, or the carrier could contract with a service bureau for a variety of CALEA compliance services using the third-party's External System.

APPENDIX D

STANDARDS FOR PACKET-MODE TECHNOLOGIES

Standards for packet content

Subcommittee TR45.2 of the TIA developed standard J-STD-025, *Lawfully Authorized Electronic Surveillance,* to serve as a "safe harbor" for wireline, cellular, and broadband PCS carriers and manufacturers under section 107(a) of CALEA. J-STD-025 was jointly published in December 1997 by TIA and Committee T1 (the latter sponsored by the Alliance for Telecommunications Industry Solutions). J-STD-025 defines services and features required by wireline, cellular, and broadband PCS carriers to support lawfully authorized electronic surveillance, and specifies the interfaces for delivering the intercepted communications (*i.e.*, content) and call-identifying information to a LEA. J-STD-025 also includes standards for some packet-mode communications capability (content only)[414] and a location information requirement.[415] The publishers of the J-Standard subsequently revised it into J-STD-025-A (Revision A of the J-Standard) to incorporate the changes adopted by the Commission in its *Third R&O* to include the six DoJ/FBI "punch list" capabilities.[416] J-STD-025-A was issued in May 2000 and became an American National Standard on April 16, 2003.

J-STD-025, J-STD-025-A and J-STD-025-B (described below) require that a Packet Data intercept access point[417] shall access data packets sent or received by the equipment, facilities, or services of an intercept subject when a packet-mode data service is provided and that packets shall be sent to a LEA when they are intercepted. TIA states that for low-volume communications (*e.g.*, short messaging service ("SMS")), the content may be included in a packet envelope message that may be provided to the LEA in a CII channel, but for high-volume communications (*e.g.*, most packet data applications) the entire packet stream must be provided to the LEA in a content channel. A Packet Data intercept access point provides access to one or more of the following packet-mode data services:

- ISDN user-to-user signaling;
- ISDN D-channel X.25 packet services;

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[414]Section 3 of J-STD-025 describes packet-mode as a "communication where individual packets or virtual circuits of a communication within a physical circuit are switched or routed by the accessing telecommunication system. Each packet may take a different route through the intervening network(s)."

[415]J-STD-025 includes a parameter that would identify the location of a subject's "mobile terminal" whenever this information is reasonably available at the Intercept Access Point and its delivery to law enforcement is legally authorized. Location information would be available to the law enforcement agency irrespective of whether a call content channel or a call data channel is employed. *See* J-STD-025 at § 6.4.6 and §§ 5.4.1-5.4.8, Tables 1, 5, 6, and 8.

[416]*See supra* ¶ 14.

[417]The intercept access point is the point within a telecommunication system where communications or call-identifying information of an intercept subject's equipment, facilities and services are accessed.

- SMS for cellular and PCS (*e.g.*, Narrowband Advanced Mobile Phone System, *TIA/EIA-41*, PCS1900, or Global Systems for Mobile Communications ("GSM")-based technologies);
- Wireless packet-mode data services (*e.g.*, Cellular Digital Packet Data, CDMA, Time Division Multiple Access, PCS1900, or GSM-based packet-mode data services);
- X.25 services;
- IP services;
- Paging (one-way or two-way); and
- Packet-mode data services using traffic channels.

Although it is clear from the text in J-STD-025, J-STD-025-A and J-STD-025-B that the content standard applies to all of the listed protocols, it is not clear whether it applies to other protocols that are not listed. For example, Asynchronous Transfer Mode is not listed. Does the standard apply to ATM communications? Does the standard apply to Ethernet and frame relay communications? Can it serve as a safe harbor for content for these and packet-mode services based on other non-listed protocols?

Standards for packet call-identifying information

This section reviews various existing standards and technical requirements for providing packet call-identifying information to Law Enforcement. Each standard is written to apply to a specific set of packet services or technology, or specific combinations of services and technologies, since what is reasonably available call-identifying information may vary by service and technology. As noted above, it is not yet determined whether any or all of these services and technologies will have CALEA obligations. For each standard, we wish to examine whether that standard would be adequate to serve as a "safe harbor" for purposes of CALEA, or whether that standard would be "deficient" for purposes of CALEA, if the services and/or technologies addressed by the standard were subject to CALEA obligations, as "safe harbor" and "deficient" are used in the CALEA statute.[418] We will be specifically interested in whether the standard provides Law Enforcement with appropriate reasonably available call-identifying information for the addressed services and technologies.

(1) TIA, ATIS, and J-STD-025-B

Subsequent to its issuing of J-STD-025-A, the TIA produced J-STD-025-B, another revision of the J-Standard. The purpose of J-STD-025-B revision is to add requirements for support of packet mode call-identifying information. J-STD-025-B was approved as a TIA standard and an ATIS trial use standard in January 2004. TIA also indicates that it will be developing another revision, J-STD-025-C, to address additional needs of LEAs.[419]

J-STD-025-B provides standards in three areas, two for wireless carriers and one for wireline carriers. First, it includes its own text for surveillance of Internet access services using cdma2000®[420] technology, which is used by many commercial wireless service providers. Second, it

[418] 47 U.S.C. §1006(a)(2) and 47 U.S.C. §1006(b).

[419] TIA Reply Comments at 7.

[420] cdma2000 is a registered trademark of TIA.

references in the current trial use standard to 3rd Generation Partnership Project ("3GPP") specifications for surveillance of both Internet access and voice over packet using UMTS wireless technology.[421] The 3GPP specifications are aligned with ATIS standard T1.724, and it is expected that the final version of J-STD-025-B will refer directly to T1.724 instead of the 3GPP specifications.[422] In January 2004 ANSI approved ATIS standard T1.724-2004, *UMTS Handover Interface for Lawful Interception.* T1.724 supports surveillance of both Internet access services and Session Initiation Protocol ("SIP")-based multimedia (including voice) over packet services using UMTS or General Packet Radio Service technology. ATIS indicates that it will be incorporating additional capabilities for ATIS into other standards in the future.[423]

Finally, J-STD-025-B references to ATIS standard T1.678 for surveillance of voice over packet services provided over wireline. In January 2004 ANSI approved ATIS standard T1.678-2004, *Lawfully Authorized Electronic Surveillance ("LAES") for Voice over Packet Technologies in Wireline Telecommunications Networks.* T1.678 supports surveillance of VoIP arrangements using two call set-up protocols: SIP and H.323-based VoIP services.

TIA and ATIS claim that "Compliance with [J-STD-025-B] satisfies the 'safe harbor' provisions of section 107 of CALEA. . . ."[424] As is also mentioned above, J-STD-025-B refers to ATIS standard T1.678 for providing LEAs with access to call-identifying information on voice over packet services provided over wireline. We seek comment on the suitability of T1.678 to serve as a safe harbor for providing LEAs with access to call-identifying information for voice over packet services provided over wireline, if voice over packet over wireline is ultimately determined to be subject to CALEA obligations. Those who consider T1.678 deficient for that purpose should identify specific deficiencies. In addition, J-STD-025-B refers to international standards aligned with ATIS standard T1.724 for providing LEAs with access to call-identifying information on both Internet access and voice over packet using UMTS wireless technology. We seek comment on the suitability of T1.724 to serve as a safe harbor for Internet access and voice over packet services provided via UMTS, if such services are ultimately determined to be subject to CALEA obligations. Those who consider T1.724 deficient for those purposes should identify specific deficiencies.

(2) Cable Television Laboratories (CableLabs®) specification[425]

In 1999 CableLabs® initiated development of a specification for lawfully authorized electronic surveillance for cable operators using systems compliant with CableLabs® PacketCable™[426] specifications for multi-media services such as IP telephony. Version I01 of the *PacketCable™ Electronic Surveillance Specification* (PKT-SP-ESP-I01-991229) was released on December 29,

[421] 3G TS 33.108, 3rd Generation Partnership Project: *Technical Specification Group Services and System Aspects: 3G Security; Handover interface for Lawful Interception.*

[422] Presentation by Nortel Networks to the FCC, March 25, 2004.

[423] ATIS Comments at 4.

[424] ATIS/TIA joint press release, "ATIS and TIA Publish Lawfully Authorized Electronic Surveillance (J-STD-025-B) Standard," March 19, 2004, available at http://www.atis.org/PRESS/pressreleases2004/031904.htm

[425] CableLabs® is a trademark of Cable Television Laboratories, Inc.

[426] PacketCable™ is a trademark of Cable Television Laboratories, Inc.

1999. It provides basic capabilities to deliver call content and call-identifying information to LEAs. Subsequently, in June 2001, the FBI submitted Engineering Change Requests ("ECRs") to CableLabs®. On August 1, 2003, CableLabs® released Version I02 (PKT-SP-ESP-I02-030815), which resolved technical issues remaining from I01 and added some new capabilities requested by the FBI, including subject and network initiated signaling. Shortly thereafter the FBI submitted additional ECRs to CableLabs®. Version I03 (PKT-SP-ESP-I03-040113), the current version, was released on January 13, 2004. It fixes minor technical errors left over from Version I02, and fully specifies language and coding over the interface to a LEA. It also provides more capabilities requested by the FBI, including VoIP-specific data to be provided to a LEA for pen register and trap-and-trace, and information on 3-way calls. The FBI's technical consultants (Trideaworks) are now on the CableLabs® technical team, and work is continuing in this area at CableLabs®.[427]

We seek comment on the suitability of any version of the *PacketCable™ Electronic Surveillance Specification* to serve as a safe harbor for voice over packet services provided over cable in a manner consistent with PacketCable™ specifications for multi-media services, if such services are ultimately determined to be subject to CALEA obligations. Those who consider any version deficient for that purpose should identify specific deficiencies.

[427]Cable Television Laboratories, Inc. electronic filing of June 10, 2004, RM-10865.

APPENDIX E

INFORMATION REQUIRED WITH SECTION 107(C) AND SECTION 109(B) CIRCUIT PETITIONS

1. Provide all information requested in paragraphs 11, 12 or 13 of the FCC's *9/28/01 Public Notice*, as applicable.[428] In addition, for each switch identified either in the service provider's Flexible Deployment template[429] or in the information provided pursuant to paragraph 13 of the *9/28/01 Public Notice*, provide the date the switch was initially installed in the service provider's network and the installation date of the most recent software generic.

2. Describe the CALEA solution(s) the service provider intends to implement by switch type (make, model and manufacturer). Include a discussion of required equipment or software upgrades and additional components such as adjunct processors that are required to implement section 103 assistance capabilities.[430] Indicate if the solution(s) involve the use of a third party CALEA service provider, association or cooperative, and the functions the third party provider is expected to perform.

3. Provide estimates of the capital cost (*i.e.*, the engineered, furnished, and installed ("EF&I") costs of hardware and/or software) of implementing the solutions in the service provider's network, by switch type. Where applicable, include the estimated costs of using a third party CALEA service provider. Support all estimates with manufacturer/service provider documentation. Also provide estimates of operations costs. Demonstrate how each estimate was derived in a manner that permits the results to be verified and duplicated.

4. Provide an indication of the impact of the cost on the service provider by indicating the total number of customers served by the provider for circuit-switched services, and by comparing the estimated total cost to the provider's capital budget for the next five years.

5. Provide the total number of requests for all lawful wiretaps the service provider has received in each of the last five years (1999-2003), and further break down that number into the following categories. (1) Provide the number of requests for pen registers and trap-and-trace interceptions the service provider has received in each of the last five years. (2) Provide the number of requests for all content interceptions the service provider has received in the last five years. (3) Provide the number of all requests for CALEA pen registers and CALEA trap-and-trace interceptions the service provider has received in each of the last three years. (4) Provide the number of requests for CALEA content interceptions the service provider has received in each of the last three years.

6. Relate any additional concerns regarding circuit-mode compliance that may affect the outcome of this petition.

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[428] *See 9/28/01 Public Notice*, *supra* n.43.

[429] *See* n.220, *supra*.

[430] 47 U.S.C. § 1002. *See also Lawfully Authorized Electronic Surveillance Joint Standard*, J-STD-025-B (TIA December, 2003).

APPENDIX F

INFORMATION REQUIRED WITH SECTION 107(C) AND SECTION 109(B) PACKET PETITIONS

1. Identify each packet service to be covered by the extension and the date that service was initially offered to the public. Include carrier-provided VoIP.

2. Provide the reason an extension is being sought for each identified packet service.

3. For each packet service, identify and list all intercept access points. List the packet network equipment in use at each intercept access point and provide the name of the manufacturer, make, model and function (*e.g.*, router, DSLAM, ATM or other packet switch) of each. Also provide the date of initial installation of the equipment in the service provider's network, the generic software release currently loaded on the equipment and the date of the installation of that software release.

4. For each packet service covered by the extension, identify the applicable industry surveillance standards or specifications (*e.g.*, TIA J-STD-025-A, TIA J-STD-025-B, ANSI T1.678, ANSI T1.724, and PACKETCABLE PKT-SP-ESP-I03-040113), if they exist, to which service provider intends to conform. If no other standard exists, the service provider should discuss specifically whether or not the packet content requirements in J-STD-025-A apply to its service offering. Wireline and wireless carriers have been required to provide packet content to LEAs consistent with the packet content portion of J-STD-025-A by September 30, 2001 since the *Third R&O* was issued.[431] A subsequent Order (FCC-01-265) extended this date to November 19, 2001.[432] If the service provider believes that the packet content requirements in J-STD-025-A are not applicable to its service offering, it should explain why not. It should also explain whether the issue is technical applicability (*i.e.*, J-STD-025-A cannot be applied to the provider's service for technical reasons) or legal applicability (*i.e.*, J-STD-025-A cannot be applied to the provider's service for legal reasons). For those cases where the service provider is unable to provide content to a LEA or to an External System in a manner consistent with J-STD-025-A, is there any alternative method or interface by which the service provider could provide content to a LEA or to an External System? If no such alternative exists, could the service provider place a probe in its network to facilitate implementation of a third party CALEA solution? Note that ignorance of applicable standards is not a justification for an extension.

5. Identify and describe the packet CALEA solution(s) the service provider plans to implement. Include a discussion of equipment or software upgrades and additional components such as mediation devices and/or probes that are required to implement the solution. Indicate if the solution involves the use of a third party CALEA service provider, association or cooperative, and the functions the third party provider is expected to perform. Indicate whether, in this solution architecture, the service provider's network equipment provides content, call-identifying information or both. Indicate whether the overall solution provides content, call-identifying information or both.

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[431] *Third R&O*, *supra* n.26 at 16801, ¶ 55.

[432] *Order*, *supra* n.29 at 6896, ¶ 1.

6. When solutions are available, provide estimates of the capital cost (*i.e.*, the engineered, furnished, and installed ("EF&I") costs of hardware and/or software) of implementing the solutions in the service provider's network. Where applicable, include the estimated costs of using a third party CALEA service provider. Support cost estimates with manufacturer/third party provider documentation. Also provide estimates of operations costs associated with providing each specific CALEA solution. Demonstrate how each estimate was derived in a manner that permits the results to be verified and duplicated.

7. Indicate the impact of the cost by providing the number of packet customers and the number of circuit customers served by the service provider in each of the past five years, and by comparing the estimated total cost to the service provider's capital budget for the next five years.

8. Provide the total number of requests received by the service provider for the following services in each of the last five years: (a) packet-mode content wiretaps; (b) circuit-mode content wiretaps; (c) packet-mode pen register and trap-and-trace wiretaps; and (d) circuit-mode pen register and trap and trace wiretaps. In addition, provide the number of LEA requests for the following CALEA services in each of the last three years: (a) packet-mode content wiretaps; (b) circuit-mode content wiretaps; (c) packet-mode pen register and trap-and-trace wiretaps; and (d) circuit-mode pen register and trap-and-trace wiretaps.

9. Relate any additional concerns regarding packet-mode compliance that may affect the outcome of this petition.

STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed Rulemaking and Declaratory Ruling.

We are entering a dynamic space in the evolution of Internet voice services and applications. As technologies re-shape communications, this Commission must continually assess the needs of the law enforcement community under the Communications Assistance for Law Enforcement Act ("CALEA"). More and more people are taking advantage of these new and exciting competitive voice offerings, and we are starting to see substantial consumer and economic benefits emerge. The development and success of the Internet has been a result, in part, of our desire to maintain its minimally regulated status. Above all, law enforcement access to IP-enabled communications is essential. CALEA requirements can and should apply to VoIP and other IP enabled service providers, even if these services are "information services" for purposes of the Communications Act. The NPRM we issue today demonstrates that the interests of the law enforcement community can be fully addressed for potential information services and these interests need not be an excuse for imposing onerous common carrier regulations on vibrant new services.

Previous Commission action on CALEA has focused primarily on circuit-mode technology. Today's item takes a major step in implementing CALEA, particularly with respect to new packet-mode technologies, by tentatively concluding that broadband Internet access services and managed voice over Internet protocol ("VoIP") services are subject to CALEA. The item also tentatively concludes that non-managed, or disintermediated, VoIP and Instant Messaging are not subject to CALEA, and that it is unnecessary to identify future services and entities subject to CALEA. Additionally, the item addresses important compliance and cost issues, and requests comment on (1) the feasibility of carriers relying on a trusted third party to manage their CALEA compliance obligations; and (2) whether standards for packet technologies are deficient and preclude carriers relying on them as safe harbors for complying with CALEA's capability requirements. Finally, in the companion *Declaratory Ruling* grants in part a Law Enforcement request in the Petition and clarifies that commercial wireless "push-to-talk" services are subject to CALEA, regardless of the technologies that Commercial Mobile Radio Service providers choose to apply in offering them.

I write to make clear that our tentative conclusion is expressly limited to the requirements of the CALEA statute and does not indicate a willingness on my part to regulate VoIP services as telecommunications services. We have before us a pending rulemaking and several petitions for declaratory ruling that address themselves to the classification of VoIP services and nothing in this item prejudices the outcome of those proceedings.

Our support for law enforcement is unwavering; it is our goal in this proceeding to ensure that law enforcement agencies have all of the electronic surveillance capabilities that CALEA authorizes to combat crime and terrorism and support Homeland Security. The Commission will devote the necessary resources to expeditiously and responsibly complete this task. In the interim, carriers, the law enforcement community and the Commission must continue to work in partnership to ensure that law enforcement retains access to the information they have now and to ensure that they have the tools they need in this ever changing environment.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed Rulemaking and Declaratory Ruling.

As set forth in the opening provision of the Communications Act, the Commission has no higher priority than promoting public safety and the national defense. I therefore support initiating this rulemaking regarding the Commission's implementation of the Communications Assistance for Law Enforcement Act (CALEA). The Department of Justice and other law enforcement agencies have raised a number of significant questions regarding the applicability of CALEA to IP-enabled services, compliance timelines, enforcement, and cost recovery, among other things. The Commission must build a thorough record to ensure that, to the extent permitted by statute, law enforcement agencies have the tools they need to conduct surveillance in a changing technological environment.

While the Commission must do its utmost to enable law enforcement agencies to combat crime and promote homeland security, it would be a mistake to gloss over the possibility that the existing statutory framework does not apply to broadband Internet access services or other IP-enabled services that are classified as information services. The NPRM we are issuing proposes a plausible interpretation of the "substantial replacement" provision in CALEA that would extend the assistance-capability requirements to broadband access services and IP telephony. But such an extension clearly would be fraught with legal risk. The Commission thus would benefit greatly from further congressional guidance in this area. While the text and legislative history of CALEA make clear that the march of technological progress should not hamper law enforcement's ability to conduct lawful wiretaps, the statute also explicitly exempts information services from its reach. The Commission has proposed a means of resolving this tension, but it remains to be seen whether our attempts to do so would pass judicial muster.

In addition to the question whether CALEA applies to IP-enabled services, the issues of enforcement and cost recovery also warrant congressional attention. Section 108 of CALEA establishes an enforcement mechanism that requires the Attorney General to bring a civil action in the appropriate federal district court. While law enforcement agencies have noted the shortcomings of this regime, it is unclear whether Congress intended the Commission to assume a central role over enforcement of the statute's requirements. Moreover, upgrading networks to comply with a new packet-mode standard for surveillance will be a costly endeavor, and there are many unanswered questions about how these costs should be recovered.

In sum, I support the Commission's initiation of this rulemaking in response to the petition filed by the Department of Justice and other law enforcement agencies. The issues raised are critical, and the Commission must provide clarity and direction to the greatest extent possible. But at the end of the day, the federal courts — rather than this Commission — will be the arbiter of whether we are authorized to take the actions proposed in this rulemaking, and we must remain mindful of that fact as we consider final rules.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING

Re: In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed Rulemaking and Declaratory Ruling.

The Commission states that its primary policy goal in this proceeding is to ensure that law enforcement has all of the resources that CALEA authorizes to combat crime and support homeland security. This is as it should be. But there are less roundabout ways to achieve this result then the collection of tentative conclusions we offer here and there are better ways to build a system that will guarantee judicial approval.

I believe today's item asks many of the right questions, but I also believe that too often it gets the reasoning wrong. It is flush with tentative conclusions that stretch the statutory fabric to the point of tear. If these proposals become the rules and reasons we have to defend in court, we may find ourselves making a stand on very shaky ground. It would be a shame if our reliance on thin legal arguments results in the CALEA rules being thrown out. Neither law enforcement nor the American people would benefit from that result.

To me, it strains credibility to suggest that Congress intended "a replacement for a substantial portion of the local telephone exchange" to mean the replacement of ***any*** portion of any individual subscriber's functionality. Capturing VoIP under the rubric of substantial replacement, ignoring the Ninth Circuit's decision in *Brand X*, and trying to slice and dice managed and non-managed services is not the way to proceed here. Making the statute bear this heavy burden denies carriers, equipment manufacturers and technology entrepreneurs the clarity they need. But more importantly, our law enforcement authorities need that clarity. Those whose job it is to shield us from harm deserve better. So I don't agree with how we got to this conclusion, but given where we are, we have the responsibility to get a proceeding going. For these reasons, I will concur, but I hope before all is said and done that the record will provide better counsel and our final decisions will put us on a sounder footing.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING

Re: In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed Rulemaking and Declaratory Ruling.

With this Notice of Proposed Rulemaking and Declaratory Ruling, we open a proceeding to examine the application and administration of the Communications Assistance for Law Enforcement Act (CALEA) as the telecommunications industry transitions to so-called packet-mode services, such as broadband Internet access and Voice over Internet Protocol (VoIP). We start this review at the request of the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration ("federal law enforcement"), but the outcome of this proceeding will also affect the ability of state and local law enforcement agencies throughout the nation, which conduct roughly half of all wiretaps, to conduct their operations efficiently and effectively.

This item begins to tackle the increasingly important issue of whether CALEA applies to broadband and VoIP services. Federal law enforcement agencies view this capability as essential to their ability to perform their missions in the digital age. It is imperative that we give law enforcement the tools that CALEA affords them and that they need to safeguard public safety and homeland security. This Notice facially accedes to law enforcement's request, but stops short of developing fully the most defensible basis for these proposed outcomes, which are at the heart of the federal law enforcement agencies' petition.

Rather than seeking comment on the most stable footing for law enforcement's request, the item seizes upon notable but thin distinctions between definitions in CALEA and the Communications Act. Moreover, the item does not acknowledge fully and seek comment on existing precedent that is in tension with the tentative conclusions here. For example, whether or not the Commission ultimately appeals the decision in the Ninth Circuit's *Brand X* case, which concluded that broadband access via cable modem includes a "telecommunications service," this Notice's failure to seek comment on a legal analysis that would comport with the Circuit's holding is an unnecessary failing. For these reasons, I concur in the result, if not the full legal analysis behind the Commission's tentative conclusions.

I am pleased that the Commission is opening this proceeding and that we can move forward with a full vetting of the issues. While we should not jump to conclusions about the many issues raised here, it is critical that we make this proceeding a priority and that we commit to a speedy resolution of the complex, but time sensitive issues raised here.